IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

TUESDAY, THE 21ST AUGUST 2007 / 30TH SRAVANA 1929

SA.No. 57 of 1993(F)

AS.19/1986 of SUB COURT, TIRUR
OS.16/1980 of MUNSIFF COURT, TIRUR
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APPELLANT/RESPONDENT/PLAINTIFF:

KRISHNAN, S/O.KARUVATHIL AYYAPPAN BY MUKTHIAR JANAKI D/O.PULIYANKUNNATH KRISHNAN, RESIDING AT MARAKKARA AMSOM, KALLARMANGALAM DESOM, TIRUR TALUK

BY ADV. T.R.RAVI & T.KRISHNANUNNI

RESPONDENT/APPELLANT/DEFENDANT:

KOODERI DEVAKI, D/O.KELAPPAN, PUTHUPALLY AMSOM DESOM, TIRUR TALUK

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 21/08/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR,J.

S.A.NO.57 OF 1993

Dated 21st August 2007

J U D G M E N T

Plaintiff in O.S.16 of 1980 on the file of Munsiff court, Tirur is the appellant. Defendant is the respondent. Plaint schedule property was allotted to respondent under Ext.A7 partition deed. Under Ext.A7, same extent of property was allotted to Kalyani and Prabhakaran. According to appellant respondent, Prabhakaran and Kalyani agreed to sell their respective plots for a consideration of Rs.500/- each and respondent executed Ext.A1 agreement and Kalyani executed Ext.A9 agreement and Prabhakaran executed Ext.A10 agreement, for sale after receiving Rs.150/- as advance towards consideration. It was contended that appellant was always ready and willing to perform his part of the agreement and on the failure of respondent to execute the sale deed, appellant sent a notice to respondent as well as to Kalyani and Prabhakaran but they did not execute the sale deeds and therefore appellant instituted O.S.16

of 1980 for specific performance of Ext.A1 agreement against respondent and O.S.15 of 1980 and O.S.17 of 1980 were filed against Kalyani and Prabhakaran. It was contended that respondent is bound to execute the sale deed after receiving the balance sale consideration of Rs.350/-. A decree for specific performance was sought for. Respondent in the written statement contended that after the partition, appellant agreed to purchase the property for a consideration of Rs.3,500/- and respondent agreed to sell the property and appellant obtained her thumb impression in a blank stamp paper and at that time nothing was written therein and no witnesses was also signed in it and Ext.A1 agreement was created using that stamp paper. It was further contended that respondent did not agree to sell the property for Rs.500/- and appellant is not entitled to the decree sought for.

2. Learned Munsiff on the evidence of Pws.1 and 2 and DW1 and Exts.A1 to A12 found that O.S.15 of 1980 and O.S.17 of 1980 were also instituted by appellant for specific performance of Exts.A9 and A10 agreements and under Exts.A6 and A11 written statements in those suits, execution of agreements were admitted by Kalyani and

Prabhakaran. Learned Munsiff also found that though the case in the written statement was that appellant had agreed to sell the property for Rs.3,500/-, when examined as DW1, her case was that she only agreed to consider the proposal and there was no agreement and held that case of respondent cannot be believed. Relying on the evidence of Pws.1 and 2 and circumstances of the case learned Munsiff found that Ext.A1 agreement was executed by the respondent and plaint schedule property was agreed to be sold for Rs.500/- and Rs.150/- was received as advance towards sale consideration. Holding that appellant was always ready and willing to perform his part of the agreement and time is not the essence of the contract, learned Munsiff granted a decree for specific performance of Ext.A1 agreement. Defendants challenged the decree and judgment before Sub court, Tirur in A.S.19 of 1986. Learned Sub Judge on re-appreciation of evidence found that case is to be appreciated on verification of Ext.A1 agreement. Comparing the thumb impression seen in Ext.A1 with the thumb impressions in the written statement and deposition and appreciating the evidence learned Sub Judge found that Ext.A1 agreement was not executed by

respondent and set aside the decree granted by the trial court and dismissed the suit. It is challenged in the second appeal.

3. Second appeal was admitted formulating following substantial questions of law.

> 1) Whether first appellate court's conclusion that Ext.A1 is not genuine is legally sustainable.
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> 2) Whether reversal of the judgment and decree of the trial court by first appellate court is legally sustainable, as first appellate court not only departed from the pleading but also did not look into the evidence on record relied on by the trial court.
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> 3) Whether first appellate court acted legally in reversing the decree passed, on comparison of thumb impression in Ext.A1 and the written statement and deposition of respondent.

4. Though notice was served on respondent she did not appear. Still appellant was directed to take out publication and publication was effected. Counsel was also directed to serve notice on the counsel who was appearing for respondent, before the courts below. In

spite of all these notices, respondent did not appear or contest the appeal.

5. Learned counsel appearing for appellant was heard.

6. A reading of the written statement filed by respondent establish that after the division of co-ownership property under Ext.A7 partition deed, appellant approached respondent as well as her brother and sister to whom similar properties were allotted under Ext.A7 partition deed, to sell their respective shares to enable appellant to construct a building in that property. Allegation in the written statement is that respondent demanded Rs.3,500/- and appellant agreed to pay the same and therefore respondent agreed to sell the property. It is the further case in the written statement that signed blank stamp paper was obtained from respondent and it was utilised for creating Ext.A1 agreement. If that be the case, there is no scope for disputing the thumb impression seen in Ext.A1. Such a contention was not seen taken before the trial court also. Learned Munsiff who had occasion to see and note the demeanour of the witnesses, disbelieved the evidence of DW1 and upheld the case of appellant that

Ext.A1 agreement was executed by the respondent. First appellate court re-appreciated the evidence. As rightly pointed out by the learned counsel appearing for appellant, interference of the decree by the first appellate court was not on re-appreciation of the oral evidence but on comparison of the thumb impression seen in Ext.A1, with the thumb impression seen in the written statement and the deposition of respondent. When it is admitted in the written statement itself that respondent affixed her signature in blank stamp paper and that blank paper was utilised for creating Ext.A1 agreement, there was no necessity to compare the thumb impression seen in Ext.A1, as identity of thumb impression was not disputed.

7. Trial court appreciated the evidence in the proper perspective. Respondent has no case that there was no agreement to sell her property to the appellant. What was pleaded in the written statement was only that it was agreed to be sold for Rs.3,500/- and not for Rs.500/-. Case was not that there was no agreement for sale at all. It is also admitted in the written statement that similar agreement was entered into with Kalyani and Prabhakaran. Exts.A6 and A11 written

statements filed by Kallyani and Prabhakaran, in the respective suits establish that they have did not dispute the execution of the agreements. Dispute was only with regard to failure of the appellant to get the sale deed executed within the time stipulated in the agreement. Both trial court and first appellate court found that time was not an essence of the contract. It was also recorded by learned Sub Judge that other two suits filed by the appellant for specific performance of Exts.A9 and A10 agreements for sale executed by Kalyani and Prabhakaran were decreed. In the light of these evidence first appellate court was not justified in interfering with the findings of learned Munsiff that Ext.A1 agreement was executed by the respondent. Finding of learned Sub Judge is therefore set aside.

8. The question then is whether appellant is entitled to the specific performance of the agreement. Evidence establish that appellant has been always ready and willing to perform his part of the agreement. In such circumstances, trial court rightly granted a decree for specific performance of the agreement.

Appeal is allowed. Decree and judgment passed by Sub Judge in A.S.19 of 1986 is set aside. Decree of the

trial court is restored. Respondent is directed to execute the sale deed, within one month from today and in default appellant is entitled to get the sale deed executed through court, on deposit of balance sale consideration.

M.SASIDHARAN NAMBIAR,
JUDGE.

uj.

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M.SASIDHARAN NAMBIAR,J.

JUDGMENT

S.A.NO. 57 OF 1993

21st AUGUST 2007

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